AB LAH ALI

v.

YONG WAH SING

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-7-1998]
6 AUGUST 2003

CIVIL PROCEDURE: *Costs - Interest on costs - Date from which interest runs - Whether incipitur rule or allocatur rule applicable - Whether interest should be at 8% per annum or less - Rules of the High Court 1980, O. 42 r. 12*

This was an appeal by the appellant against the learned registrar's decision awarding interest at 8% per annum on taxed costs, with effect from the date of the High Court judgment on 10 January 2001, and not from the date of allocatur issued by the taxing registrar on 2 October 2002. The issues requiring determination were: (1) where a successful party is awarded costs, whether the interest thereon runs from the date of entry of the judgment ('the incipitur rule'), or from the date of completion of taxation by way of an allocatur by the taxing registrar ('the allocatur rule'); and (2) if the interest runs from the date of entry of the judgment, whether the interest should be at 8% per annum or less.

Held:

[1] The present rule governing the award of interest on judgment debts is contained in O. 42 r. 12 of the Rules of the High Court 1980 ('RHC') and was given judicial gloss by Abdul Malek Ahmad FCJ in *Gooi Hock Seng v. Chuah Guat Khim*. There, in relation to the item of interest on costs, the applicants had not impressed upon the taxing registrar that the order for costs was a judgment debt under O. 42 r. 12 of the RHC, and no interest thereon was awarded. Upon review, the learned judge followed the incipitur rule enunciated in *Liau Kim Lian v. Bajuria* and *Hunt v. RM Douglas (Roofing) Ltd*, and awarded interest from the date of judgment. Thus, the incipitur rule applied in this case and the award of interest on costs should be from the date of the entry of judgment to the date of realisation. (pp 234 g-h, 235 a-b & 236 a)

[2] Order 42. r. 12 of the RHC specifically states that the rate of interest shall be at 8% per annum or such other rate of interest as the court directs. The learned registrar had not erred in exercising her discretion in awarding 8% interest per annum as she had indeed followed the first limb of O. 42 r. 12 of the RHC and correctly applied established judicial principles referred to in this case. (p 236 b)

[Appeal dismissed.]

Case(s) referred to:

Ashworth v. English Card Clothing Co Ltd (No 2) 1 Ch 704 ***(refd)***

Boswell v. Coaks [1887] 57 LJ Ch 101 ***(foll)***

Chen Teti v. Ornasteel Resort [2003] 3 CLJ 91 HC ***(refd)***

Comptroller of Income Tax v. Pi Rm Family & PV Family [1953] 19 MLJ 156 ***(refd)***

Erven Warnink BV v. J Townend & Sons (Hull) Ltd (No 2) [1982] 3 All ER 312 ***(refd)***

Fisher v. Dudding [1841] 9 Dowl 872 ***(refd)***

Gooi Hock Seng v. Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, si mati [2001] 1 CLJ 583 SC ***(foll)***

Hitachi Zosen Robin Dockyard (Pte) Ltd v. Lee Pui Keng & Anor [1988] 2 MLJ 473 ***(refd)***

Hunt v. RM Douglas (Roofing) Ltd [1988] 3 WLR 975 ***(foll)***

In re London Wharfing and Warehousing Co [1885] 54 LJ Ch 1137 ***(refd)***

Jeeford & Anor v. Gee [1970] 2 WLR 702 ***(refd)***

K & K (divorce costs: interest) [1977] 1 All ER 576 ***(not foll)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [2002] 4 CLJ 259 FC

Landowners' West of England and South Wales Land Drainage and Inclosure Co v. Ashford [1884] 33 WR 41 ***(refd)***

Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 HC ***(refd)***

Newton v. Grand Junction Railway Co [1846] 16 M & W 139 ***(refd)***

P Suppiah v. Tara Rajaratnam (m.w.) [1989] 2 CLJ 461; [1989] 2 CLJ (Rep) 532 HC ***(refd)***

Pyman & Co v. Burt and Boulton [1884] WN 100 ***(foll)***

Raja Abdullah Wahman Raja Sulaiman & Anor v. Toplink Technologies Sdn Bhd [2003] 5 CLJ 263 HC ***(refd)***

Sam Hock Ming v. Hong Leong Assurance Sdn Bhd (Civil Suit No: 23-113-86) (unreported) ***(refd)***

Taylor v. Roe [1894] 1 Ch 413 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Vong Ban Hin v. Laksamana Realty [2003] 3 CLJ 129 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 3, 11
Courts of Judicature Act 1964, ss. 16, 25(2)
Rules of the High Court 1980, O. 42 r. 12
Rules of the Supreme Court 1957, O. 40 r. 11(2)

Judgments Act 1838 [UK], s. 17

For the appellant's - Lai Kuan Jean; M/s Taye & Co
For the respondent - Jaspal Singh Gill; M/s Raghbir Singh Norizan & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

It seems to me that two factors *viz* the instinct for an adversarial battle and the passion for in-depth research on the part of the appellant's learned counsel have sparked off this appeal against the decision of the learned registrar who on 29 May 2003 awarded interest at 8% p.a. on the taxed costs, with effect from the date of the High Court judgment on 10 January 2001, and not from the date of allocatur issued by taxing registrar on 2 October 2002.

Factual Background

On 10 January 2001, KN Segara J dismissed with costs ("the High Court judgment") the appellant's appeal against a sessions court decision.

Notice of taxation in encl. (19) was filed on 22 October 2001 and when it was disposed of on 2 October 2002, no interest was awarded by the then taxing registrar on the taxed costs since it was not sought by the respondent's learned counsel.

However, after *Kerajaan Negeri Johor & 1 Lagi v. Adong Kuwau & 51 Lagi* [2002] 4 CLJ 259 FC was reported, respondent's learned counsel on 30 October 2002 wrote to the learned registrar requesting the issue to be tried, on the ground that the allocatur has not been extracted and so the learned registrar was not *functus officio.*

Upon hearing both learned counsel, on 29 May 2003, the learned registrar awarded interest at the rate of 8% per annum on the taxed costs of RM36,862.10 from 10 January 2001 to the date of realisation.

The appellant has paid the taxed costs together with interest thereon from the date of allocatur till the date of full payment of the taxed costs, leaving the interest unpaid, from the date of the High Court judgment on 10 January 2001 till 2 October 2002, pending my decision in this appeal.

Submission For Appellant

Cik Lai Kuan Jean, appellant's learned counsel, is mindful of the "the incipitur rule" which says that interest on taxed costs is to run from the date of entry of judgment.

However, she urges this court to reconsider the law and to apply "the allocatur rule" which says that interest on taxed costs should run from the date the taxation of costs is completed by the issue of the taxing registrar's allocatur.

She elaborated that there are two sets of interest *viz.*:

1. under s. 11 of the Civil Law Act 1956 for the period 'between the date when the cause of action arose and the date of judgment'; and

2. under O. 42 r. 12 of the Rules of the High Court 1980 for post-judgment interest.

In the instant appeal, she submitted that O. 42 r. 2 applies, and that the Federal Court decision in *Liau Kim Lian v. Bajuria* [1971] 1 MLJ 276 which is on the construction of O. 40 r. 11(2) of the then Rules of the Supreme Court 1957 may be distinguished from O. 42 r. 12 of the Rules of the High Court 1980, on the ground that the provisions in these two orders are not in *pari materia.*

As regards *Gooi Hock Seng v. Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, simati* [2001] 1 CLJ 583, it was submitted that the issue was "whether interest is payable where an order directs payment of costs to be taxed" and that *Sam Hock Ming v. Hong Leong Assurance Sdn Bhd* Ipoh High Court Civil Suit No. 23-113-86 should not have been followed.

She then contended that in *Hunt v. R.M. Douglas (Roofing) Ltd.* [1988] 3 WLR 975, the House of Lords applied "the incipitur rule" on the basis of s. 17 of the Judgments Act 1838 (UK) which provided, *inter alia*, that "every judgment debt shall carry interest ... from the time of entering the judgment" and that "... any costs ... shall have the effect of judgments ...". She said that Malaysia does not have such a provision, other than the Courts of Judicature Act 1964, s. 16, s. 25(2) and para 7 in the Schedule thereto, regulating the powers of the court to award interest on eg, judgment debts, and to order when interest on costs is to run.

It was also submitted that in Malaysia an order for payment of costs to be taxed cannot be a judgment debt because no execution can be levied until it is quantified and *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 and *Comptroller of Income Tax v. Pi. Rm. Family & P.V. Family* [1953] 19 MLJ 156 were cited in support.

In the light of s. 3 of the Civil Law Act 1956, she submitted that the statutes referred to in the English cases cited in *Liau Kim Lian, supra*; *Gooi Hock Seng, supra* and *Kerajaan Negeri Johor v. Adong, supra* are not for general application in our courts.

Appellant's learned counsel relied on the rules of equity in contending that this court should follow K & K (divorce costs: interest) [1977] 1 All ER 576, which, she submitted, has been followed by LC Vohrah J in *P. Suppiah v. Tara Rajaratnam (m.w.)* [1989] 2 CLJ 461; [1989] 2 CLJ (Rep) 532.

She said interest is to be awarded on the basis of a person being kept out of money which ought to have been paid, as was said in *Jeeford And Another v. Gee* [1970] 2 WLR 702; and *Hitachi Zosen Robin Dockyard (Pte.) Ltd. v. Lee Pui Keng & Anor*. [1988] 2 MLJ 473 Singapore Court of Appeal.

Interest, she added, was not even awarded in *Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127 HC, as it was discretionary, not mandatory.

Finally, in the event that this court is not persuaded to apply "the allocatur rule", she asked the court to reduce the interest to 4% per annum as 8% is a punishment to the appellant for having to pay more than that paid by financial institutions.

Contention For Respondent

En. Jaspal Singh Gill, learned counsel for the respondent, contended that in Malaysia, "the incipitur rule" applies and that *Liau Kim Lian, supra*, should not be distinguished.

He submitted that in *P. Suppiah, supra*, the judgment creditor had merely asked for interest from the date of taxation and not from the date of judgment.

He added that *K v. K (divorce costs: interest), supra*, had been overruled by the House of Lords in *Hunt, supra*, and that UK and Malaysia share the same position ie, "the incipitur rule" applies.

Decision On Appeal

Questions For Determination

Both the learned counsel have settled the following questions for determination herein:

(1) where a successful party is awarded costs, does the interest thereon run from the entry of the judgment or from the date of completion of taxation by way of an allocatur by the taxing registrar?

(2) if the interest runs from the entry of the judgment, should the interest be at 8% p.a. or less?

Incipitur Rule Or Allocatur Rule?

In deference to the getting up which both the learned counsel have diligently exerted, I shall delve upon the development of these two rules, which have been so succinctly set out by Lord Ackner of the House of Lords in *Hunt, supra,* at pp. 978 to 981, which I shall venture to summarise herein.

In the UK, prior to the passing of the Judgments Act 1838, interest on costs could not be recovered.

Later, under s. 17 of the Judgments Act 1838, "every judgment debt shall carry interest ... from the time of entering up the judgment ... until the same shall be satisfied."

The Judgments Act 1838 did not define the vital words "entering up the judgment". This had led to different views taken by the common law courts, as opposed to the Chancery courts.

In *Fisher v. Dudding* [1841] 9 Dowl 872, the Court of Common Pleas applied the incipitur rule and awarded interest on costs from the date of the incipitur ie, the time of signing judgment or making the entry of the incipitur in the master's book. That decision was approved in *Newton v. Grand Junction Railway Co* [1846] 16 M & W 139 of the Court of Exchequer.

However the Court of Chancery apparently took a different view by applying the allocatur rule in *Boswell v. Cooks* [1887] 57 LJ Ch 101 in awarding interest on costs from the date of the allocatur (certificate) of the taxing master (the counterpart of our registrar).

The Supreme Court of Judicature Acts 1873 and 1875 (UK) set up the High Court of Justice. In Schedule 1 to the Act of 1875 there appeared in Appendix F, Form 1 which directed the sheriff to levy the amount of costs allowed on taxation "together with interest thereon", with a reference to a footnote which stated: "the date of the certificate of taxation" in line with the allocatur rule.

Subsequently, the Chancery practice of applying the allocatur rule was effected throughout the entire High Court.

1883 saw new Rules of the Supreme Court (UK) and the allocatur rule effected by the aforesaid footnote was replaced by a new footnote:

> Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

The effect of the alteration of the statutory footnote was considered in *Pyman & Co. v. Burt and Boulton* [1884] WN 100, where Field J concluded:

> In the absence of any special order, no distinction is made between interest on the debt and interest on the costs. Both begin to run from the day of the judgment.

The incipitur rule was applied and followed by Pearson J in the Chancery Division in Landowners' West of England and *South Wales Land Drainage And Inclosure Co. v. Ashford* [1884] 33 WR 41; *In Re London Wharfing And Warehousing Co.* [1885] 54 LJ Ch 1137; *Boswell v. Coaks* 57 LJ Ch 101 CA; *Taylor v. Roe* [1894] 1 Ch 413; and *Ashworth v. English Card Clothing Co. Ltd (No. 2)* 1 Ch 704.

From 1884 to 1965, the principle that interest on costs ran from the date of judgment appeared to have been firmly established.

However, 1965 saw the Rules of the Supreme Court (Revision) (UK) and the footnote in Form 1 was omitted altogether, as a result of which Lord Denning MR in *K v. K, supra,* at p. 582 held that the modern rule should be and is, that interest on costs ran from the date of the master's certificate of taxation quantifying the same or such other date as may be ordered as the date on which payment is to be made.

Be that as it may, in *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd. (No. 2)* [1982] 3 All ER 312, another UK Court of Appeal favoured the incipitur rule.

The contest between the incipitur rule and the allocatur rule was finally resolved by the House of Lords in *Hunt* which concluded that the Court of Appeal in. *K v. K, supra,* misapprehended the nature of the amendment made to the new form and the decisions in *Pyman, supra,* and *Boswell, supra,* affirming the incipitur rule, were correct. Accordingly, the incipitur rule prevails. In the circumstances *K v. K, supra,* has been overruled by the House of Lords and so the allocatur rule ceased to apply.

In Malaysia, the incipitur rule was applied by the Federal Court in *Liau Kim Lian, supra.* On a true construction of O. 40 r. 11(2) of the then Supreme Court Rules 1957 (the precursor of the Rules of the High Court 1980), in respect of taxed costs, interest was awarded from the date of entry of judgment. This was followed by Peh Swee Chin J (later FCJ) in Ipoh Civil Suit No. 23-113-86.

The present rule governing the award of interest on judgment debts is contained in O. 42 r. 12 of the Rules of the High Court 1980 in the following words:

> 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

Order 42 r. 12 was given judicial gloss by Abdul Malek Ahmad FCJ in *Gooi Hock Seng, supra.* In relation to the item of interest on costs, applicants' counsel there had not impressed upon the taxing registrar that the order for costs was a judgment debt under O. 42 r. 12 and no interest thereon was awarded. Upon review, the learned judge of the Federal Court followed the incipitur rule enunciated in *Liau Kim Lian, supra,* and *Hunt, supra,* and awarded interest from the date of judgment.

The same learned judge also awarded 8% interest on costs from the date of the judgment of the appeal although not specifically claimed in *Kerajaan Negeri Johor v. Adong, supra*.

The incipitur rule was also applied by Abdul Malik Ishak J in *Raja Abdullah Wahman Raja Sulaiman & Anor v. Toplink Technologies Sdn Bhd* [2003] 5 CLJ 263, and by me in *Chen Teti v. Ornasteel Resort* [2003] 3 CLJ 91; and *Vong Ban Hin v. Laksamana Realty* [2003] 3 CLJ 129, 135.

I have my reservation on the accuracy of the submission by learned counsel for the appellant to the effect that *K v. K, supra,* was followed by LC Vohrah J in *P Suppiah, supra*. Upon a proper perusal of the learned judge's judgment, it is to be observed that *K v. K, supra,* was referred to by his Lordship who concluded as follows:

> In the present case the judgment creditor has not asked for interest from the date of judgment as she would seem entitled to on the authority of *Liau Kim Lian*'s case but only from the date of taxation, a date which I prefer as being more reasonable. ...

It is interesting to note that Abdul Malik Ishak, J in *Raja Abdullah, supra,* observed that LC Vohrah J had vigorously applied the rule that interest is to be calculated from the date of judgment.

On my part, in addition to the observation of Abdul Malik Ishak J, I would add that the judgment of LC Vohrah J is to the effect that had the appellant there asked for an award of interest from the date of the judgment, it would have been granted, but in the absence of such a prayer, the award of interest from the date of taxation was preferred as being more reasonable. Hence, I am unable to see how the appellant herein is able to derive any support from the judgment of LC Vohrah, J in *P. Suppiah, supra.*

The answer to question 1 above is that the incipitur rule applies and award of interest on costs shall be from the date of the entry of judgment to the date of realization.

The Rate Of Interest

Order 42 r. 12 specifically states that the rate of interest shall be at 8% per annum or such other rate of interest as the court directs. The learned registrar has awarded 8% interest and I am unable to find any error in the exercise of that discretion as she has indeed followed the first limb of O. 42 r. 12 and correctly applied established judicial principles alluded to in the aforesaid plethora of authorities.

Conclusion

On the foregoing grounds, I am unable to sustain the submissions presented for the appellant. I therefore dismiss this appeal and affirm the decision of the learned registrar. As the parties' counsel have agreed that no costs be ordered in this appeal, I hereby give effect to their wishes and make no order as to costs herein.